A jury returned into court, after having been out five days, and stated that they could not agree, and asked to be discharged. The court stated that "this is the third trial of the cause;" that on the first trial a verdict had been found, and the next time there had been a mistrial; that it now stands upon its third trial; that upon each occasion the trial had occupied the court for nearly a fortnight; that "it was very important there should be an end to this litigation, if practicable, and it was the duty of the jurors to cultivate a spirit of harmony, and to arrive at a verdict if they could." Held, not objectionable, as tending to prejudice the jury. Phœnix Ins. Co. *v* Moog, 81 Ala. 335, 1 South. 108; 46 Am. Dig., Cent. Ed., col. 1898.

It is not error to instruct the jury, after they have been out some twenty hours, that if one or two of their number differed in their views of the evidence from the others they should be induced not to surrender conscientious convictions, but to doubt the correctness of their own judgments, and inquire whether they were not mistaken. Gibson *v.* Minneapolis, St. P. & S. S. M. Ry. Co., 55 Minn. 177, 56 N. W. 686, 43 Am. St. Rep. 482.

Instructions to a jury that "the fact that a juror finds his judgment opposed to the judgment of a majority of the panel ought to induce him, as a reasonable man, so far to doubt the correctness of his own views as to weigh carefully the opinions of his associates, and the arguments and reasons on which they are founded, and if, upon due consideration, he is convinced that they are probably right, and he is in error, it is his duty to agree with them," are not erroneous. Ahearn *v.* Mann, 60 N. H. 472.

While the law contemplates that the jury shall, by their discussions, harmonize their views if possible, it does not contemplate that they shall compromise for mere purpose of an agreement. The court is not authorized to direct the jury to bring in a compromise verdict. 11 Am. & Eng. Enc. Pl. & Prac. 306 and cases cited.

Where a jury, being unable to agree, returned into court for further instructions, it was improper for the court to state to them that it was necessary for all or some of them to make concessions with a view to rendering a verdict. O'Neal *v.* Richardson, 92 S. W. 1117, 78 Ark. 132.

Furthermore, it is not proper to give an instruction censuring jurors for not agreeing with the majority nor to comment on the small amount involved or use language amounting to an expression of an opinion. 11 Enc. Pl. & Pr. 304; 38 Cyc. 853; 46 Cent. Dig., col. 1898; 19 Dec. Dig. p. 1247.

WASHINGTON-VIRGINIA RAILWAY CO. *v.* BOUKNIGHT.

Wytheville, June 13, 1912.

[8 Va. App. 647.]

1. Pleading and Practice—Declaration—Grounds of Complaint—Demurrer.—If a defendant desires a more particular statement of the grounds of complaint, his remedy is not by demurrer but by motion for a bill of particulars.

2. Carriers—Passengers—Negligence—Presumption — Declaration.—Where the relation of passenger and carrier exists, and there is a

derailment resulting in an injury to the passenger, a presumption of negligence on the part of the carrier arises; therefore, all that it is necessary for the declaration to allege in such a case is the relation of passenger and carrier, the derailment, and the injury by reason thereof.

3. **Idem—Declaration—Surplusage.**—Where a count in a declaration charges that the plaintiff was a passenger on the defendant's car; that the car was derailed, and by reason of the derailment the plaintiff was injured; and further charges that the defendant was guilty of carelessness and negligence in running the car upon which plaintiff was injured, the charge of carelessness and negligence is to be regarded as surplusage, as the count without this language is sufficient to make a case of presumptive negligence.

4. **Idem — Declaration — Presumptive Negligence — Waiver.** — By joining in a declaration counts charging affirmative negligence with counts charging presumptive negligence, the plaintiff does not waive the right to rely upon the charge of presumptive negligence.

5. **Evidence—Order of Introduction—Rebuttal.**—Where evidence introduced in chief might properly have been introduced in rebuttal, its admission will not be held erroneous. The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely if ever to be controlled by an appellate court.

6. **Idem—Character of Injury—Jury.**—It is for the jury to say upon all the evidence in a case whether or not the plaintiff could have sustained such an injury as one of the witnesses described. The court will not instruct the jury to disregard the evidence of a particular witness because it varies in details from the testimony of other witnesses for the plaintiff.

7. **Carriers—Passenger—Burden of Proof.**—Where an injury to a passenger results from the derailment of a car in which the passenger is riding, the presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that it has been guilty of no negligence whatsoever, and that the damage has been caused by inevitable casualty, or by some cause which human care and foresight could not prevent.

8. **Damages—Excessiveness.**—In the case stated, held that $7,500 damages are not excessive.

Error to Circuit Court of Alexandria county. Affirmed.

Moore, Barbour & Keith, Jas. R. & H. B. Caton, for plaintiff in error.

Moncure, Wampler & Gloth, Thos. S. Martin, for defendant in error.

KEITH, P., absent.

CARDWELL, J.: The Washington-Virginia Railway Company

owns and operates a line of electric cars from Washington, D. C., to certain terminal points in the State of Virginia, and this action was instituted by the plaintiff in the court below, defendant in error here, against the said railway company to recover damages for personal injuries alleged to have resulted from the negligence of the defendant company. To the final judgment of the circuit court in favor of the plaintiff for $7,500 and costs, the defendant company brings error.

Seventeen bills of exceptions have been taken and made part of the record, and are made the basis of eleven assignments of error in the trial court's rulings, which are relied on for a reversal of said judgment by this court; but in the view we take of the case it is not necessary to consider these assignments seratim or at length.

The leading facts of the case are, that the plaintiff on the 9th day of January, 1911, boarded a car of the defendant at East Falls Church, in Alexandria county, Virginia, paying her fare to Washington, D. C., where she desired to go; that when about two miles from the city of Washington, the car upon which the plaintiff was riding was derailed, and she was thrown violently from her seat forward for some distance to the floor, and severely injured.

The declaration contains eight counts, to which and to each count thereof the defendant demurred and filed in writing five grounds for its demurrer, but these grounds, in fact, present but two questions: first, as to the sufficiency of the eighth count of the declaration, and, second, whether or not there can be joined in the same declaration counts charging affirmative negligence and counts relying upon the presumption of negligence arising by reason of the facts therein alleged.

The eighth count in the declaration alleges that the plaintiff was a passenger upon the defendant's car; that the car was derailed and by reason of the derailment the plaintiff was injured. The court, upon motion of the defendant, required the plaintiff to file a bill of particulars to this count, which she did in these words: "That in said count the plaintiff relies upon the presumption of negligence arising from the derailment of the defendant's car, the reason for the derailment charged in said count, so far as said count is concerned, not being known to the plaintiff, and she relies upon the presumption of negligence which the law creates in such cases."

It is true that this count in the declaration went further and charged that the defendant conducted itself so carelessly and negligently that the plaintiff was injured whilst upon its said car, "the said car being derailed by reason of the carelessness and negligence of the said defendant," etc., but when this count is

read together with the bill of particulars filed by the plaintiff, it is made manifest that the defendant was thereby fully apprised of the case it had to meet.

"If a defendant desires a more particular statement of the grounds of complaint, his remedy is not by demurrer but by motion for a bill of particulars." Interstate R. Co. *v.* Tyree, 110 Va. 38.

The language of the eighth count of the declaration in this case, charging carelessness and negligence on the part of the defendant in running its car upon which the plaintiff was injured, was to be regarded as surplusage, as the count without this language was sufficient to make out a case of presumptive negligence.

Where the relation of passenger and carrier exists, and there is a derailment resulting in an injury to the passenger, a presumption of negligence on the part of the carrier arises; therefore, all that it is necessary for the declaration to allege in such a case is the relation of passenger and carrier, the derailment, and the injury by reason thereof, as was done in this case.

The case here is differentiated from the cases relied on for the defendant by the fact that in none of these cases was there, strictly speaking, the relation of passenger and carrier, and, therefore, the presumption of negligence on the part of the carrier did not arise upon the facts alleged.

In discussing the second question presented by the demurrer, the learned counsel for the defendant make the contention that the plaintiff, by alleging acts of affirmative negligence in the first seven counts of her declaration, thereby waived her right to rely upon the presumption of negligence arising from the derailment of the car; in other words, that counts charging affirmative negligence cannot be joined with counts in which the presumption of negligence is relied upon.

The same contention was made and ably argued in Walters *v.* Seattle Railroad Co., 48 Wash. 233, 24 L. R. A. (N. S.) 793, but was overruled, the opinion of the court saying: "This contention is not tenable. The plaintiff was not deprived of the case proved by a failure to prove all that was alleged. She was only obliged to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. * * * Doubtless in many cases it is desirable to plead and prove the exact cause of an accident in order that the question of the defendant's negligence may be put beyond the peradventure of doubt, and thus insure a recovery, where otherwise a recovery might be doubtful, if the presumption alone were relied upon. Such was perhaps the purpose of the plaintiff in this instance. But the plaintiff is not to be deprived of the case her pleadings and proof made, merely because she alleged a stronger case than she was able to prove."

The point made in that case and in this is, that where a plaintiff does not content himself with alleging generally that he was a passenger on the car, that a derailment or a collision occurred, and that he was injured thereby, but went further and alleged particularly the cause of the accident, the cause alleged must be proved, otherwise the plaintiff cannot recover. In other words, that to such a case the doctrine of res ipsa loquitur cannot be applied.

In Kluska *v.* Yoemans (Wash.), 103 Pac. 821, the court said: "We follow the rule announced in Massachusetts and other jurisdictions, which holds in effect that a plaintiff who proves the happening of an accident and is otherwise entitled to certain presumptions arising therefrom, does not lose the benefit of such presumptions because he has alleged what he conceived to be the specific cause of the accident." See also, McNamara *v.* Boston &c. R. Co., 202 Mass. 497, and cases there cited; McNeil *v.* Durham &c. R. Co., 130 N. C. 256.

It is well settled that the doctrine of res ipsa loquitur applies where the facts alleged in the eighth count of the declaration in this case are proven, and the burden is thereby cast upon the defendant of "explaining the circumstances of the accident so as to relieve itself from liability." City & Sub. R. Co. *v.* Svedborg, 20 App. D. C. 543; Gleason *v.* Va. Midland R. Co., 140 U. S. 435.

While the burden is always upon the plaintiff to establish his right to recover by the preponderance of the evidence, in cases where the causes of the accident are peculiarly within the knowledge of the defendant, proof of the happening of the accident establishes a prima facie case which calls for rebuttal and explanation on the part of the defendant. The plaintiff by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him. Scott *v.* London Docks Co., 3 H. & C. 596; Salmond on Torts, p. 29; Peters *v.* Lynchburg Trac. Co., 108 Va. 333.

In the case in judgment, the plaintiff, upon the close of the evidence adduced, moved the court to strike out the counts of her declaration from 1 to 7, inclusive, which was done; therefore, the defendant could not possibly have been injured by the ruling of the court upon the demurrers to the declaration.

The defendant, pursuant to the statute (Sec. 3370 of the Code, as amended Acts of Assembly 1910, p. 376) propounded and filed certain interrogatories to the plaintiff, to all of which she made answer, and the refusal of the court to strike out the answers of the plaintiff on the ground that they are evasive and self-serving is made the basis of the defendant's second assignment of error.

We are unable to see any merit in this assignment of error,

as the answers of the plaintiff to the interrogatories propounded to her appear to us as being directly responsive to the interrogatories, and are not amenable to the criticism of them made by the defendant. Nor did the court err in overruling the defendant's motion for a continuance of the cause, made because of its ruling refusing to strike out the answers of the plaintiff to said interrogatories which had been propounded to her.

The third assignment of error relates to the refusal of the court to require the plaintiff to file new and further particulars as to the eighth count of her declaration. Practically all that had been said with respect to the first assignment of error applies as well to the third.

It is again insisted in the argument of the third assignment of error, as in the argument of the first, that as the plaintiff alleged in her declaration negligence and carelessness on the part of the defendant which resulted in the injuries she sustained, she had assumed the burden of proof as to each and every count of her declaration, and was compelled before she could recover to establish by a preponderance of the evidence that her injury was the result of some act or acts of negligence on the part of the defendant; and that the plaintiff could not relieve herself of the burden of proving affirmative negligence on the part of the defendant under the eighth count of her declaration, and make a new case by her bill of particulars so as to shift the burden of proof upon the defendant to show that it was not guilty of any negligence in the performance of its duties towards the plaintiff.

We do not so read the bill of particulars filed by the plaintiff, which but states in plain terms that she relies upon the presumption of negligence which the law creates where the cause of the accident is unknown to the plaintiff; and the eighth count of her declaration, to which the bill of particulars applied, had alleged facts and circumstances out of which the presumption of negligence on the part of the defendant arises as matter of law.

It is needless to repeat in this connection what we have already said going to show that because a plaintiff in a case like this alleges and attempts to prove more than he is required to do, the presumption of negligence is removed, or the rule of evidence with respect to the burden of proof is changed.

In Deardon *v.* Railroad Co. (Wash.), 93 Pac. 273-274, the opinion of the court says: "When it is shown that a person has sustained an injury under circumstances where the maxim (res ipsa loquitur) applies, he is not required in the first instance to prove any particular defect by evidence, other than by the prima facie presumption, although the facts with respect to some defect are unnecessarily alleged with particularity in the complaint. All that the plaintiff was required to aver and prove to entitle him

to recover was the relation of passenger and carrier, that the accident through which he received his injuries was connected with the means, or instrumentality, used by the defendant in the transportation, and an injury resulting therefrom. * * * That the plaintiff averred and undertook to show a defective brake chain as evidence of negligence causing the collision, did not waive or affect the presumption of negligence arising from the circumstances, etc., etc. The evidence of a defective brake chain which the plaintiff produced was also proof of such negligence, and was in aid of and not adverse to the presumption." MeNeill *v.* Durham &c. R. Co., supra; Cassady *v.* Old Colony Ry. Co., 184 Mass. 156, 63 L. R. A. 288.

In the last named case the court says: "The defendant contends, that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine, because instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. This position is not tenable. * * * If at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

The fourth and fifth assignments of error relate to the ruling of the court refusing to reject or to strike out, after the same had been admitted, the testimony of N. L. Martin and Clarence Harrison, witnesses introduced on behalf of the plaintiff to sustain the issue on her part in her case in chief.

There is much force in the contention of the defendant that if the declaration in the case had contained only its eighth count in the first instance, the testimony of Martin and Harrison would not have been admissible in the plaintiff's case in chief; but it cannot be successfully maintained that after the defendant had introduced evidence to show that its machinery was in good order, its track in proper condition, and its cars inspected, the testimony given by Martin and Harrison would not have been proper in rebuttal. So that, after the case was closed, and upon the plaintiff's motion the counts of her declaration from 1 to 7 inclusive had been stricken out, the said witnesses might have been recalled to testify for the plaintiff in rebuttal of the testimony that had been introduced by the defendant with respect to the condition of its machinery, tracks, cars, etc., and, therefore, the sole question for determination in this connection is, has the defendant been prejudiced by the order in which the testimony given by Martin

and Harrison was allowed to go to the jury for their consideration?

"The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. Much latitude of discretion should be allowed the trial court in the matter of recalling witnesses, and its action will not be reversed by an appellate court except for palpable error." Burke *v.* Shaver, 92 Va. 345; Tate *v.* The Bank &c., 96 Va. 765.

We are unable to find anything stated in the testimony of either Martin or Harrison that would not have been proper in rebuttal of evidence introduced by the defendant; therefore, it was proper evidence to be considered by the jury along with all the other evidence in the case, and the court did not err in refusing to strike it out.

Assignments of error sixth and seventh raise practically the same question, and will, therefore, be considered together.

Dr. Smallwood, the attending physician of the plaintiff, testifying for her, after explaining the difference between an impacted fracture and a straight fracture and stating that the plaintiff had sustained an impacted fracture of the hip—i. e., the bone was separated and by violence driven one piece into the other—said that in order to sustain an impacted fracture of the hip, the blow would have to be directed against the hip bone; and in reply to the question, if that fracture could have happened by the plaintiff falling over on her face, the witness answered that she would have to fall on the hip to have a fracture, and the blow would have to come directly on the outside of the femur of the hip bone. The plaintiff and other witnesses introduced in her behalf testified as to the occurrence which resulted in the injuries to her, that she was thrown from her seat forward violently to the floor, etc.; and at the close of all the evidence offered on behalf of the plaintiff to sustain the issue on her part, the defendant moved the court to exclude from the record, and to instruct the jury that they must not regard in their consideration of the case, the evidence relating to an impacted fracture of the hip bone, "for the reason that according to plaintiff's own testimony, the blow must have come from the side, and directly on the hip bone, to have produced the character of fracture claimed, and there is no evidence in the record that she had such a blow, and the evidence of all the witnesses for the plaintiff is to the effect that she fell upon her face in the aisle of the car."

That there was some variance in the statements of the witnesses as to what took place and how the plaintiff fell upon the floor when she had been thrown violently from her seat, is not at all remarkable or unnatural, and it would have been an unreasonable

requirement of the plaintiff that she prove in the most minute detail just how she fell and what she struck. The evidence showed the construction of the interior of the car, the aisle, with seats on either side thereof; that the plaintiff was sitting in the second seat from the front of the car and was thrown a distance of at least ten feet against the front door of the car, her feet going up and her head going down; and it was for the jury to say upon this and all the other evidence in the case whether or not the plaintiff could have sustained the injury of an impacted fracture of her hip bone. Had the jury been left alone to inferences to be drawn from the evidence, they might reasonably and properly have inferred that the plaintiff was thrown from her seat, across the aisle, against the seat, striking her right hip, then to the floor, and in that way had her hip broken.

The rulings of the trial court complained of in the assignments of error six and seven, were clearly right, and therefore these assignments of error are also without merit.

The eighth assignment of error seems to be based upon an erroneous theory of the law, that upon the defendant showing inspection, and good condition of track and machinery, the burden of proof shifted to the plaintiff, and she was required to show wherein the defendant had been, in these respects, negligent.

"Where an injury happens, as the result of an accident such as the record discloses, the presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been caused by inevitable casualty, or by some cause which human care and foresight could not prevent." Dawson *v.* Southern Ry. Co., 98 Va. 578.

"When the physical facts of an accident themselves create reasonable probability that it resulted from negligence, the physical facts themselves are evidential and furnish what the law terms evidence of negligence, in conformity with the maxim res ipsa loquitur." Richmond Ry. Co. *v.* Hudgins, 100 Va. 413.

The authorities both in England and America sustain the proposition that a presumption of negligence arises upon proof of a derailment, and that the burden of proof is upon the defendant to show that it is without fault. Among the very many authorities in this country are, B. & O. Ry. Co. *v.* Noell, 32 Gratt. 399; Gilmore *v.* Brooklyn &c. Ry. Co., 39 N. Y. Supp. 417; St. Louis &c. R. Co. *v.* Cooksey, 70 Ark. 481; Southern P. Co. *v.* Covin, 144 Fed. 348; Seybolt *v.* N. Y. &c. R. Co., 95 N. Y. 562; Whalen *v.* Consol. Trac. Co., 61 N. J. L. 606; Louisville &c. Ry. Co. *v.* Jones, 108 Ind. 558. See also, Fetter on Carriers of Passengers, 480, et seq; Patterson's Ry. Acc. L. 274, note 7; 13 L.

R. A. (N. S.), n., p. 606; 14 Am. & Eng. R. R. Cases (N. S.) 289, n.

In Louisville &c. Ry. Co. *v.* Jones, supra, the court says: "When the plaintiff made it appear that she was a passenger upon appellant's train, and while being carried as such the car in which she was seated left the track and she suffered injuries thereby, she has shown a state of things upon which a presumption of negligence arose against the railroad company, which stood with the force and efficiency of actual proof of the fact, and was available for her benefit until negatived and overthrown, and that such presumption can only be overthrown by proof that the casualty resulted from inevitable or unavoidable accident, against which no human skill, prudence or foresight, as usually and practically applied to careful railroad management, could provide."

As we have observed, the plaintiff in this case had shown that she was a passenger on a car of the defendant; that the car on which she was seated was derailed, and she was thereby injured, upon which proof the jury might have rendered a verdict for her, and whether or not the defendant had shown by a preponderance of the evidence that it was free from the charge of negligence was a question for the jury; and, therefore, the trial court did not err in refusing the request of the defendant for a peremptory instruction directing the jury to find a verdict in its favor.

The ninth assignment of error relates to the refusal of the court to sustain the objections of the defendant to certain instructions asked by the plaintiff, and, without citation of authorities, the assignment merely challenges the production of any authority to the effect that a defendant, in a case where the doctrine of res ipsa loquitur applies, must not only show that it is free from negligence, but must also give an explanation of the cause of the accident, and show by a preponderance of the evidence that it was guilty of no negligence whatever.

We think that we have already cited ample authority for the rule, that where the plaintiff has shown that she was a passenger of the carrier; that while a passenger the car of the carrier upon which she was riding was derailed; and that she thereby sustained injury, she was entitled to recover damages for the injury, unless the defendant showed by affirmative evidence that the accident had been caused by inevitable casualty, or by some cause which human care and foresight could not prevent; and how else, it may be asked, can a defendant in a case like this show that it was guilty of no fault whatever, except by affirmative proof of facts sufficient to account for the derailment and to explain the reason therefor? In the absence of a satisfactory

explanation by the defendant of the cause of the accident, going to show that the defendant was free from fault, the plaintiff is entitled to a verdict. Dawson *v.* Southern Ry. Co., supra; Richmond &c. Ry. Co. *v.* Hudgins, supra; McNamara *v.* Boston &c. Ry. Co., supra; Magee *v.* N. Y. &c. Ry. Co., 195 Mass. 111; Snyder *v.* Wheeling &c. Co. (W. Va.), 39 L. R. A. 502; Och *v.* Missouri &c. Ry. Co. (Mo.), 36 L. R. A. 442; Robinson *v.* St. L. &c. Ry. Co., 103 Mo. App. 110; Breen *v.* Pacific L. Co., 130 Cal. 435.

The court in this case, in the instructions to the jury, propounded the law applicable to the facts which the evidence tended to prove in accordance with the views expressed in this opinion, and, therefore, the defendant was without just cause of complaint with respect to the instructions given; and the case having been fully and fairly submitted to the jury upon every phase of it presented in the evidence, the court did not err in refusing other instructions asked by the defendant.

The remaining assignment of error requiring consideration raises the question, whether or not the verdict of the jury is contrary to the evidence, and whether or not the damages assessed by the jury are excessive.

The evidence to which we have adverted is of itself sufficient to sustain the finding of the jury in favor of the plaintiff, and in addition to the fact that there is nothing whatever in the record indicating that the jury in ascertaining the damages, acted under the impulse of an improper motive, gross error, or misconception of the subject, the evidence very plainly shows that the plaintiff, about thirty years of age, in the possession of all her faculties, enabling her to earn for her services as a clerk in one of the departments of the United States government at Washington, D. C., $900 per annum at the time she sustained the injuries of which she complains in this suit, suffered an impacted fracture of the hip, causing her continuous and intense pain; that this injury is permanent; that at the time of the trial of this cause her broken limb was one-half inch shorter than the other; that she would always limp, and as time went on the shortening of the limb would increase. In view of these facts, this court would not be justified in disturbing the verdict of the jury on the ground that the damages assessed to the plaintiff are excessive.

Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court, and, therefore, it is affirmed.

Affirmed.

Note.

The proposition enunciated in this case that where an injury to a passenger results from the derailment of a car in which the pas-

senger is riding, the presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that it has been guilty of no negligence whatsoever, and that the damage has been caused by inevitable casualty, or by some cause which human care and foresight could not prevent, is well sustained by the cases. See Baltimore, etc., R. Co. *v.* Noell, 73 Va. (32 Gratt.) 394; Baltimore, etc., R. Co. *v.* Wightman, 70 Va. (29 Gratt.) 431; Southern R. Co. *v.* Dawson, 98 Va. 578, 36 S. E. 996; Roberts *v.* Chicago, etc., R. Co., 78 Ill. App. 526; George *v.* St. Louis, etc., R. Co., 34 Ark. 613; Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488; Dimmitt *v.* Hannibal, etc., R. Co., 40 Mo. App. 654. See, also, 9 Cent. Dig., col. 1238, 4 Dec. Dig., p. 528, 6 Cyc. 630, and 2 Va.-W. Va. Enc. Dig., pp. 704-725, and numerous cases there cited.

When it is shown that the injuries were caused by the derailment of the train, the burden is on the defendant to show that the derailment was not due to its negligence, and it devolves on defendant to show that the derailment resulted from accident, or from something which human foresight could not avoid. 9 Cent. Dig., col. 1238, 4 Dec. Dig., p. 529, 6 Cyc. 630; Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514; 9 So. 722; Eureka Springs Ry. Co. *v.* Timmons, 51 Ark. 459, 11 S. W. 690; Mitchell *v.* Southern Pac. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; Rio Grande Western Ry. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76; Central R. Co. *v.* Sanders, 73 Ga. 513; Pittsburg, etc., R. Co. *v.* Thompson, 56 Ill. 138; Louisville, etc., R. Co. *v.* Jones, 118 Ind. 551, 9 N. E. 476; Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488; Meador *v.* Mo. Pac. R. Co. (Kan.), 61 Pac. 442; Louisville, etc., R. Co. *v.* Ritter, 2 Ky. Law Rep. 385; Baltimore, etc., R. Co. *v.* Worthington, 21 Md. 275, 83 Am. Dec. 578; Furnish *v.* Mo. Pac. R. Co., 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; Spillman *v.* Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 75, 20 L. R. A. 316; Bergen County Traction Co. *v.* Demarest, 62 N. J. L. 755, 42 Atl. 729; 72 Am. St. Rep. 683; Webster *v.* Elmia, etc., R. Co., 85 Hun (N. Y.) 167, 32 N. Y. Supp. 590, 65 N. Y. St. 628; Illinois Cent. R. Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. 202; Houston, etc., R. Co. *v.* Richards, 20 Tex. Civ. App. 203, 49 S. W. 687; Baltimore, etc., R. Co. *v.* Neoell, 32 Gratt. 394; Baltimore, etc., R. Co. *v.* Wightman, 70 Va. (29 Gratt.) 431.

Where, in an action to recover for personal injuries resulting from the derailment of defendant's car, if the evidence of negligence aside from the derailment is equally balanced, the derailment sufficiently shows negligence entitling plaintiff to recover. Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 South. 363.

In an action for injuries to a passenger by a derailment of the car, caused by a defective switch, proof of the fact of derailment and of the injury was sufficient to establish a prima facie case of the carrier's negligence, which, unless explained, entitled the passenger to a recovery. Logan *v.* Metropolitan St. Ry. Co., 82 S. W. 126, 183 Mo. 582; Baltimore, etc., R. Co., 21 Md. 275, 83 Am. Dec. 578.

Where it is shown, in an action against a railroad company for injuries caused by a train breaking through a bridge, that the accident was caused by defective construction of the roadway at the point where the derailment occurred, or its train or cars, or by the management of the train, this would create a presumption of negligence and cast upon defendant the burden of proving that it was not caused by any negligence in the construction or mainte-

nance of its roadway, or management of the train, but it is not required to prove that nothing about its entire train and railway was defective. Pershing *v.* Chicago, etc., R. Co., 71 Iowa 561, 32 N. W. 488.

Furthermore "where injuries are received by a passenger in a derailment accident, the presumption of negligence arises irrespective of proof of the cause of the derailment, or where the proof shows the derailment to have been caused by the giving way of any part of the roadbed, or by the misplacement of a switch or rail." 5 Am. & Eng. Encyc. of Law, p. 627, citing numerous cases. See, however, San Antonio, etc., R. Co. *v.* Robinson, 73 Tex. 277.

The proposition enunciated is also applicable to street railways, but some courts feeling that the same amount of caution should not be required on street railways as to steam railroads have not recognized this doctrine, especially where street cars are not operated by mechanical or by mechanical and electric power.

If a street car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption. An injury by derailment is of itself prima facie evidence of negligence on the part of the railway company, which the latter is bound to rebut by proof that the accident was not due to the carelessness of its employees, in order to escape liability. Ind. Union Traction Co. *v.* McKinney, 39 Ind. App. 86; Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Heyde *v.* St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127; Spellman *v.* Lincoln Rapid-Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; Bergen County Traction Co. *v.* Demarest, 62 N. J. L. 755, 42 A. 729, 72 Am. St. Rep. 685; Cincinnati St. Ry. Co. *v.* Kelsey, 9 Ohio Cir. Ct. R. 170; Reading City Pass. Ry. Co. *v.* Eckert (Pa.), 4 Atl. 430; Cheatham *v.* Union R. Co., 26 R. I. 279, 58 A. 81; 9 Cent. Dig., col. 1239; 4 Dec. Dig. 529; 6 Cyc. 630. See, to the contrary, Hastings *v.* Central Crosstown R. Co., 7 App. Div. 312, 40 N. J. Supp. 93; Omaha St. Ry. Co. *v.* Boesen, 105 N. W. 303, 74 Neb. 764, 4 L. R. A. (N. S.), 122. See, also, Adams *v.* Union Ry. Co., 80 N. Y. S. 264, 80 App. Div. 136, 12 N. Y. Ann. Cas. 386, and cases cited.

The doctrine of res ipsa loquitur applies to cases of injuries to passengers caused by derailment of a street car operated by mechanical or by mechanical and electric power, but it does not operate to shift the burden of proof. The happening of the accident and the attending circumstances raise a presumption of negligence sufficient to warrant a finding of negligence, in the absence of any explanation on the part of the defendant. It is then encumbent upon the defendant, in order to escape liability, to offer evidence tending to rebut this presumption of negligence; but the burden of proof is not shifted upon the defendant. The burden of establishing that the injuries were received through the negligence of the defendant rests upon the plaintiff at the commencement of the trial, and there continues throughout the trial. Adams *v.* Union Ry. Co., 80 N. Y. S. 264, 80 App. Div. 136, 12 N. Y. Ann. Cas. 386.